VIRGINIA LAW REGISTER

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Race Discrimination—Separate Coach Laws—Obiter.

The decisions of the Supreme Court of the United States in the case of McCabe *v.* Atkinson, Topeka & Sante Fe Ry. Co. et als., U. S. S. C. Advance Opinions, January 1, 1915, p. 59, is surprising in only one way, and that is the amount of *dicta* in the case. For the opinion is filled with points absolutely unnecessary to the decision, but which we think absolutely justified by the importance of the case. The State of Oklahoma passed in 1907 what is known as a separate "coach law." It provided that, "every railway company * * * doing business in this State as a common carrier of passengers for hire" should "provide separate coaches or compartments for the accommodation of the white and negro races, which separate coaches or cars should be" equal in all points of comfort, etc., etc.; that separate waiting rooms with equal facilities, etc., should be furnished, and defined "negro" to include every person of African descent as defined by the State Constitution. It further provides that nothing contained in the act should be construed to prevent railway companies "from hauling sleeping cars, dining or chair cars attached to their trains to be used exclusively by either white or negro passengers separately but not jointly." Penalties, etc., were prescribed for failure to observe the law.

On February 15, 1908, just before the time when the statute, by its terms, was to become effective, five negro citizens of the State of Oklahoma (four of whom are appellants here) brought this suit in equity against the Atchison, Topeka, & Santa Fe Railway Company, the St. Louis & San Francisco Railroad Company, the Missouri, Kansas, & Texas Railway Company, the Chicago, Rock Island, & Pacific Railway Company, and the Fort Smith & Western Railroad Company, to restrain these companies from making any distinction in service on account of race On

February 16, 1908—after the act had been in operation for a few days—an amended bill was filed seeking specifically to enjoin compliance with the provisions of the statute for the reason that it was repugnant (a) to the commerce clause of the Federal Constitution, (b) to the Enabling Act under which the State of Oklahoma was admitted to the Union (Act of June 16, 1906, chap. 3335, § 3, 34 Stat. at L. 267, 269), and (c) to the 14th Amendment. The railroad companies severally demurred to the amended bill, asserting that it failed to state a case entitling the complainants to relief in equity. The Circuit Court sustained the demurrers, and, as the complainants elected to stand upon their bill, final decree dismissing the bill was entered. This decree was affirmed by the Circuit Court of Appeals (109 C. C. A. 110, 186 Fed. 966), and the present appeal has been brought.

The conclusions of the court below, as stated in its opinion, were, in substance:

1. That, under the Enabling Act, the State of Oklahoma was admitted to the Union "on an equal footing with the original States," and, with respect to the matter in question, had authority to enact such laws, not in conflict with the Federal Constitution, as other States could enact; citing, Permoli *v.* New Orleans, 3 How. 589, 609, 11 L. Ed. 739, 748; Escanaba & L. M. Transp. Co. *v.* Chicago, 107 U. S. 678 688, 27 L. Ed. 442, 446, 2 Sup. Ct. Rep. 185; Willamette Irc Bridge Co. *v.* Hatch, 125 U. S. 1, 31 L. Ed. 629, 8 Sup. Ct. Rep. 811; Ward *v.* Race Horse, 163 U. S. 504, 41 L. Ed. 244, 16 Sup. Ct. Rep. 1076; Bolln *v.* Nebraska, 176 U. S. 83, 44 L. Ed. 382, 20 Sup. Ct. Rep. 287. See also Coyle *v.* Smith, 221 U. S. 559, 573, 55 L. Ed. 853, 860, 31 Sup. Ct. Rep. 688.

2. That it had been decided by this court, so that the question could no longer be considered an open one, that it was not an infraction of the 14th Amendment for a State to require separate, but equal, accommodations for the two races. Plessy *v.* Ferguson, 163 U. S. 537, 41 L. Ed. 256, 16 Sup. Ct. Rep. 1138.

3. That the provision of § 7, above quoted, relating to sleeping cars, dining cars, and chair cars, did not offend against the 14th Amendment, as these cars were, comparatively speaking, luxuries, and that it was competent for the legislature to take into

consideration the limited demand for such accommodations by the one race, as compared with the demand on the part of the other.

4. That, in determining the validity of the statute, the doctrine that an act although "fair on its face" might be so unequally and oppressively administered by the public authorities as to amount to an unconstitutional discrimination by the State itself (Yick Wo v. Hopkins, 118 U. S. 356, 373, 30 L. Ed. 220, 227, 6 Sup. Ct. Rep. 1064) was not applicable, as there was no basis in the present case for holding that any discriminations by carriers which were unauthorized by the statute were practiced under State authority.

5. That the act, in the absence of a different construction by the State court, must be construed as applying to transportation exclusively intrastate, and hence did not contravene the commerce clause of the Federal Constitution. Louisville, N. O. & T. R. Co. *v.* Mississippi, 133 U. S. 587, 590, 33 L. Ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Chesapeake & O. R Co. *v.* Kentucky, 179 U. S. 388, 391, 45 L. Ed. 244, 246, 21 Sup. Ct. Rep. 101; Chiles *v.* Chesapeake & O. R. Co., 218 U. S. 71, 54 L. Ed. 936, 30 Sup. Ct. Rep. 667, 20 Ann. Cas. 980.

6. That with respect to the existence of discriminations the allegations of the bill were too vague and uncertain to entitle the complainants to a decree.

The Supreme Court—Mr. Justice Hughes delivering the opinion, the Chief Justice, Holmes, Lamar and Reynolds, JJ., concurring only in the result—upheld the lower court's decision upon every one of these conclusions except the third, which in the opinion is held not to be sound because it makes the constitutional right of the negro depend upon the number of persons who may be discriminated against; whereas the essence of the constitutional right is that it is a personal one and if the individual is denied by a common carrier acting under the authority of a State law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.

The peculiar feature of this case is that not a single one of

these conclusions was necessary to the decision of the case. The learned Justice held that the bill had to be dismissed and the relief prayed for denied, because the suit was brought before the law went into effect and the amended bill filed very shortly thereafter and that there was no injury established as to complainants. None of the complainants alleged that they had ever traveled on any of the roads complained of or even requested transportation, or been refused accommodation in sleeper or diner or anywhere else. Under the most elementary principles the complainants had no standing in court, it not appearing that they had any need of relief or did not have an adequate remedy at law. The bill was therefore dismissed upon this ground, and whilst we are very glad to see the principles set out in the opinion approved by a majority of the court, yet we are by no manner of means satisfied that this case is authority for a single principle laid down in it, except the one that there was no equity in a bill filed under the circumstances. For, many years since, in Carroll *v.* Carroll's Lessee, 57 U. S. (16 Howard) 275, the Supreme Court of the United States said: "If the construction put by the court of a State upon one of its statutes was not a matter of judgment, if it might have been decided either way without affecting any right brought into question, then according to the principles of common law an opinion upon such a question is not a decision. To make it so there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs. And therefore this court, as other courts organized under the common law, has never held itself bound by any part of an opinion in any case, which was not needful to the ascertainment of the right or title in question between the parties."

We can very well see why the Chief Justice and Holmes, Lamar and Reynolds, JJ., concurred only in the result. At the same time, in our judgment the opinion of Mr. Justice Hughes upon all the conclusions of the lower court, except the third, merely reiterated and affirmed principles well settled by previous decisions of the court, and his opinion in the third conclusion is clearly good law, even if it was not necessary to the decision of the case. We have always believed, and reiterate our belief, that

when a constitutional question is fairly and squarely presented to a court of last resort it ought to be settled, no matter upon what other grounds the case was affirmed or reversed. See our editorial, 20 VIRGINIA LAW REGISTER 71.

Knocked into a Cocked Hat.

After long and tedious litigation the United Hatters of North America and the American Federation of Labor have learned the lesson which the Hatter impressed upon Alice: "It's very easy to make more than nothing." They have also learned that it's a poor rule which doesn't work both ways, and that tyrannical labor is no more above the law than tyrannical capital. The Supreme Court of the United States on the 5th of January handed down a final decision in the celebrated Danbury Hatters case, as it is generally called, and the court is very severe in its strictures upon the practices and by-laws of the association first mentioned. It sustained the verdict of the lower court that the defendant members of the Union were guilty of conspiracy in restraint of trade and liable for the heavy damages imposed in the lower forum. Justice Holmes, who handed down the court's decision, said, in part:

"The substance of the charge is that the plaintiffs were hat manufacturers who employed non-union labor; that the defendants were members of the United Hatters of North America and also the American Federation of Labor; that in pursuance of a general scheme to unionize the labor employed by manufacturers of fur hats (a purpose previously made effective against all but a few manufacturers) the defendants and other members of the United Hatters caused the American Federation of Labor to declare a boycott against the plaintiffs and against all hats sold by the plaintiffs to dealers who should deal in them; and that they carried out their plan with such success that they have restrained or destroyed the plaintiffs' commerce with other States."

"We agree with the Circuit Court of Appeals," Justice Holmes continues, "that a combination and conspiracy forbidden by the statute were proved and that the question is now narrowed to

the responsibility of the defendants for what was done by the sanction and procurement of the societies above named.

"It is a tax upon credulity to ask any one to believe that members of labor unions of that kind did not know that the primary and secondary boycott and the use of 'we don't patronize' or the 'unfair' list were expected to be employed in the effort to unionize these shops. The jury could not but find that by the usage of the unions the acts complained of were authorized and authorized without regard to their interference with commerce among the States."

Referring to the propriety of the evidence submitted in the lower court, Justice Holmes said:

"The introduction of newspapers, etc., was proper in large part to show publicity in places and directions where the facts were likely to be brought home to the defendants, and also to prove an intended and detrimental consequence of the principal acts, not to speak of other grounds."

It was in 1912, after a ten weeks' trial, that a jury found guilty the living defendants named in the suit against the Hatters' Union, thirty-four having died—and rendered a verdict of $80,000, as originally claimed, which, trebled, made, with the costs, $252,000. Appeal was again had to the Circuit Court of Appeals. That court affirmed the judgment. From this decision the defendants appealed to the Supreme Court. Most of the defendants, it is said, live near Danbury.

The illegal nature of the acts complained of had been settled in the case of the Retail Lumber Dealers Association *v* United States, but the decision in the present case fixes the personal liability of members of the offending unions and is salutary to the highest degree in that it establishes the fact that the same rule applies—as it ought to apply—to those who supply capital and those who supply labor, as to the illegal acts of each.

There has been some discussion as to the permanent value of this decision in the light of the Clayton Anti-Trust Act passed by the Congress at its last session. But that act in our judgment does not give the unions any new rights and certainly does not excuse members of any union from responsibility for the acts of those unions to which they gave their consent. Nor should they be excused; for once establish the fact that any man or

set of men are above the law, or are separated from the rest of their fellows by reason of their position or occupation, as to the effect of their illegal acts, then a tyranny of the worst sort is established and life, liberty and property are at the mercy of unrestrained and lawless men.

The Initiation of an Initiative

The Anti-Alien Employment Act which was adopted by the people of the State of Arizona upon an initiative, has been held to be null and void by the Federal Court of that State, and even the "police power" failed to save it. This was an act prohibiting an employer from employing more than twenty per cent of alien laborers. An injunction was asked and granted against the enforcement of this act and the court now makes that injunction permanent. The Supreme Court of the United States has recently held that the right to labor is a right of property.

The wisdom and correctness of this ruling cannot be called in question. The Constitution of the United States provides that no State can deprive an individual of the right to property. Whether this inhibition extended to the property of aliens has not always been free of doubt; but the court in the present case expressly decides that it does. In declaring the act null and void, "The law was intended," the court's opinion says, "to be a police regulation, but under guise of police regulation the State was in effect depriving the complainant of his right to labor, guaranteed to him by the Fourteenth Amendment to the United States Constitution.

"If under guise of police regulation a State can prohibit an employer from employing more than 20 per cent of alien labor it can prohibit him from employing more than 5 per cent, and if 5 per cent, any at all."

This decision may have and ought to have a far wider effect than is to be seen at first glance. Not only does it establish the fact that the Fourteenth Amendment to the Constitution of the United States protects aliens as well as citizens; but it opens a rather interesting question as to the future attitude of the courts upon the relations between union and non-union labor and the

protection of labor from the assaults it so often has to endure at the hands of its friends.

The rights of aliens as against discriminatory laws passed by the States, in violation of treaties between the United States and foreign nations, may be widely extended by following the reasoning of this opinion. That the decision is right, few thinking men will question. Its effect whether for good or evil cannot be considered in the light of that fact.

The Federal Employers' Liability Act.

Every decision upon this Act is of importance in view of the fact that there are yet many undetermined questions arising under the statute. In the case of Garrett *v.* L. & N. R. R. Co., U. S. S. C., Advance Sheets, January 1, 1914, p. 32, Mr. Justice Reynolds speaking for the court declares it to be now definitely settled that the Act declares two distinct and independent liabilities resting upon the common foundation of a wrongful injury: (1) Liability to the injured employee for which he alone can recover; and (2) in case of death, liability to his personal representatives "for the benefit of the surviving widow or husband and children," and if none, then of the parents, which extends ONLY to the *pecuniary* loss and damage resulting to them by reason of the death. This case also settles the point that the right of action created by the Act in behalf of an injured railway employee is extinguished by his death as the result of such injury.

Nearly every State in the Union has remedied this last unjust provision of similar statutes. The United States should do so as well.

The Stamp Tax Again —Bonds and Deeds.

The Commissioner of Internal Revenue has decided that a bond is a promissory note. At least that is the effect of T. D. No. 2110, which to the average Virginia lawyer reading the decision would make him imagine that he was suffering a slight attack of D. T. No. 1. The opinion is as follows:

"In order to make plain the meaning of said Treasury Decision it may be stated that taxable bonds, under the Revenue Act of October 22, 1914, are divided into two distinct classes, having neither in form, purpose nor law any resemblance whatever to each other. They are:

"First: Bonds issued as certificates or evidence of indebtedness, generally based upon mortgages or some other character of security founded upon real or personal property.

"Second: Bonds of indemnity for loss, to secure the performance of the duties of any office or position, or for the doing of any other thing therein specified.

"The first class is taxed under the law at five cents on each one hundred dollars of face value, or fraction thereof, when issued by any association, company or corporation. If, however, they are issued simply by an individual, and based either upon his individual credit or property, and obligating him to pay a certain sum or sums of money at a specified time or times, with or without coupons simply marking and indicating interest due thereon, and whether or not based upon a mortgage of either personal or real property, they fall within the taxation imposed upon promissory notes, that is to say, two cents when promising to pay a sum not exceeding one hundred dollars, and two cents for each additional one hundred dollars, or fractional part thereof.

"The second class, bonds or obligations of the nature of indemnity for loss, security, or guaranteeing official obligations, are accompanied usually by sureties either personal or corporate. When such bonds are executed only by persons without charge therefor in the nature of premium, they fall under the subdivision of class two, which the law designates as 'bonds of any description * * * not otherwise provided for in this schedule, fifty cents.' Such personal indemnity bonds, therefore, without premium are the only character of bonds within the revenue act subject to a fifty cent tax. Indemnity bonds, issued by any person, association or corporation transacting the business of indemnity insurance, are taxable in all cases and for all purposes at the rate of one-half of one cent on each dollar, or fractional part thereof, upon the total amount of premium charged.

"The first class of bonds are almost uniformly based upon mortgages of either personal property or real property, whereas the second class would rarely be issued in connection with a mortgage or other property used as security or collateral for the payment of a debt. The nature and purpose of the two bonds would fix their status for taxation, and not the extraneous facts as to whether they were issued

with or without mortgages. Any inconsistent ruling heretofore made is modified in line with the foregoing."

In addition to this ruling we give the opinion of the Commissioner in full in regard to the tax on deeds, etc., which seems to be founded on right reason, though it is hard to reconcile the first clause of the decision with the exact terms of the Act.

"The act provides that a deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred or otherwise conveyed, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or incumbrance thereon, exceeds $100 and does not exceed $500, shall be subject to a tax of 50 cents., and for each additional $500 or fractional part thereof in excess of $500, 50 cents.

"For instance, where a property is sold for $2,000, $1,000 of which is received in cash and a promissory note for the balance, the tax to be imposed upon the deed should be computed on the basis of the cash received and the said promissory note becomes subject to the tax imposed upon such instruments, that is, $1 on the deed and 20 cents on the note.

"In the case of a deed which states that the transfer is made for a nominal consideration, or a consideration of $1, the tax must be computed upon the actual value of the interest or property conveyed, the amount of any lien or incumbrance being deducted, and the person who executes the deed is required to affix stamps thereto and becomes liable to penalty if stamps in a sufficient amount, based upon the actual value of the consideration given, are not so affixed.

"A deed which is executed, dated and delivered prior to Dec. 1, 1914, is not subject to tax under the provisions of the said act, and therefore may be accepted for record subsequent to that date without having documentary stamps affixed thereto.

"A deed which was dated prior to Dec. 1, 1914, but was acknowledged before a notary public and delivered subsequently to that date, is taxable.

"Section 13 of the said act provides that it shall not be lawful to record or register any instrument, paper or document required by law to be stamped unless stamp or stamps of the proper amount shall have been affixed and canceled in the manner prescribed by law.

" 'Where a deed is presented to a recording officer and it appears probable that an insufficient amount of internal revenue stamps are attached thereto and he is not satisfied with

the explanation furnished by the party offering the same for record, he should notify the Collector of Revenue. It is not expected that the recording officer will institute an investigation to see whether there has been any violation of the law; nor is it thought that he should exact an affidavit showing the true consideration.

"A contract for the sale of real estate which provides for the issuance of a deed at some future date upon the fulfillment of certain conditions is not subject to tax, if executed by the owner of the land. If executed by a broker it is subject to a tax of 10 cents.

"A partition deed which is operative in defining boundary lines or in showing by location each tenant-in-common's interest is not subjected to tax.

"A quit claim deed given for no consideration, or merely the nominal consideration of $1 for the purpose of correcting a flaw in title, is not subject to tax. No tax is imposed upon an option for the purchase of real property.

"Oil leaves, leases of mining property, long term mining leases, &c., which, in themselves, convey no title to, or interest in, real property are exempt from tax.

"Deeds in escrow do not become subject to the said tax, until the final delivery is made. Therefore, if delivery of such a deed is made subsequent to December 1, 1914, it becomes subject to the tax imposed upon conveyances.

"Deeds of release and deeds of trust are exempt from tax under the provisions of the said act.

"Deeds issued by Masters in Chancery, Sheriffs, &c., to cover transfer of property sold under a foreclosure or execution are subject to tax, the cost of which may be added to the court costs.

"Deeds to burial sites which do not convey title to land, but only a right to sepulchre, to erect monuments, &c., are exempt from tax.

"A deed issued to cover a gift of property from husband to wife, or from parent to child, or from an individual to a municipality or other political sub-division, wherein the consideration named is 'natural love and affection and $1,' 'desire to promote public welfare and $1,' or '$1 and other valuable considerations,' is not taxable.

"In the case of an exchange of two properties, the deeds transferring title to each are subject to tax, which should, in each case, be computed on the basis of the actual value of the interest or property conveyed, the amount of any lien or incumbrance being deducted.

"A deed executed by a debtor covering an assignment of property to a trustee to be held for the benefit of a creditor

is not subject to tax. When, however, the trustee sells or conveys such property, either to the creditor or any other person, the deeds executed by him are taxable.

"A deed transferring title to property to a building and loan association for the purpose of securing a loan on the property so conveyed, which property is immediately reconveyed to its owner, is not subject to tax; the deed of reconveyance being likewise exempt.

"A deed given by a husband and wife to a 'straw man' who immediately executes a deed reconveying the property to the wife is not subject to tax if given for no valuable consideration, or merely the nominal consideration of $1, and likewise the deed of reconveyance is exempt."

Of course these decisions of Commissioner Osborne are not finalities. Any one of them can be tested in the court, but the amount involved is usually so small it is hard to find a suitor willing to undertake the task. We would like very much to see the decision of the court upon those clauses in the Act which specifically say "*Bonds* of any description not otherwise provided for in this schedule," and when previously "promissory notes, except bank notes" and "renewals of same" are taxed 2 cents per $100.

If the Congress intended to use legal phraseology—and it is presumed it did—it must have intended a bond to mean a bond and a note a note. But the Commissioner doesn't think so and his opinion goes until reversed by some court.

Consolidation of "The Green Bag" and "Central Law Journal."

And talking of "sprightly neighbors" we notice that the *Green Bag* has been merged with the *Central Law Journal*, the latter acquiring the subscription list and good will of the former and retaining Mr. Arthur W. Spencer, editor of the *Green Bag*, as its assistant editor. We shall miss the *Green Bag*, which was a distinct genus in legal periodical literature, and trust that the *Central Law Journal* will retain some of the characteristics which made it a pleasant as well as useful visitor to our editorial table.